To: Office of the Attorney General of Texas

From: Texas Home School Coalition Association, Texas Eagle Forum, Texas Values, Texas Pastor's Council, Concerned Women for America

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RE: AG Opinion Request RQ-0258-KP

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I. Issues Presented:

What standards have the U.S. and Texas Supreme Courts applied when balancing the rights of the state against the fundamental right of parents to raise their children free from government intrusion?

II. Introduction:

The question presented for review has been explored extensively by the U.S. Supreme Court and the Texas Supreme Court over the last 100 years.

In order to answer this question, we must first examine the nature of fundamental rights under the Fourteenth Amendment as well as the scope of the particular fundamental right in question: the right of parents to raise their children. Then we may explore the analysis required of the courts before those fundamental rights may be burdened.

III. The Due Process Clause of the Fourteenth Amendment Provides Heightened Protection for Certain Fundamental Rights

The Fourteenth Amendment provides both substantive and procedural protection for certain fundamental rights. The Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

The United States Supreme Court has held that "[T]he [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citation omitted). "The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

Indeed, the Fourteenth Amendments' guarantee of due process "include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

Fundamental rights receive heightened protection from the U.S. Constitution and their infringement is treated with the highest level of scrutiny.

IV. Parental Rights are Fundamental Rights Protected Under the Fourteenth Amendment

The right of parents to raise their children free from government interference is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The Texas Supreme Court has likewise held the right of parents to be fundamental and protected by the U.S. Constitution. *In re Derzapf*, 219 S.W.3d 327, 334–35 (Tex. 2007); *In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008); *In re Scheller*, 325 S.W.3d 640, 642 (Tex. 2010).

The office of the Texas Attorney General previously explored certain implications of this right when it reviewed sections of the Texas Family Code under Attorney General Abbott in light of the *Troxel* decision. *Tex. Atty. Gen. Op.* GA-0260 (Tex.A.G.), 2004 WL 2326558 ("The message of Troxel may thus be summarized: state statutes that infringe upon a parent's right to control the care and custody of his or her children are subject to strict scrutiny.").

Precedent from the U.S. Supreme Court and the Texas Supreme Court make it clear beyond reasonable debate that the right of parents to raise their children free from government interference is a fundamental right that is protected by the Due Process Clause of the Fourteenth Amendment and subject only to laws that pass strict scrutiny.

A. Ninety-Six Years of United States Supreme Court Precedent Supports the Fundamental Right of Parents to Raise Their Children.

Over the last ninety-six years, the United States Supreme Court has expounded considerably on the rights of parents to raise their children without governmental interference.

In 1923, the Court held that the rights of parents are "essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The liberty protected by the Fourteenth Amendment includes the right to "establish a home and bring up children." *Id*. It further includes "the power of parents to control the education of their own." *Id*. at 401.

In the decades that followed, the Court returned to the issue numerous times, each time restating the fundamental nature of the right of parents to raise their children. *Pierce*, 268 U.S. at 534–35 ("[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parent."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential.'"); *Yoder*, 406 U.S. at 232 ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("[T]he relationship between parent and child is constitutionally protected."); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Lassiter v. Dept. of Soc. Services of Durham County, N. C.*, 452 U.S. 18, 27 (1981) ("A parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'") (citations omitted); *Santosky v. Kramer*, 455 U.S. at 753 (Discussing "The fundamental liberty interest of natural parents in the care, custody, and management of their child."); *Glucksberg*, 521 U.S. 702 at 719-720 ("[T]he Due Process Clause includes the [right]. . . to direct the education and upbringing of one's children").

Upon reviewing the expansive history of Supreme Court cases on the subject, the Court in *Troxel* concluded that "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66.

Going back nearly 100 years, the United States Supreme Court has consistently held that parents have a fundamental right to raise their children free from government interference.

B. Texas Supreme Court Precedent Likewise Supports the Fundamental Right of Parents

Like the U.S. Supreme Court, the Texas Supreme Court has consistently upheld the fundamental, constitutional right of parents to raise their children.

As early as 1976, the Texas Supreme Court stated that "The natural right which exists between parents and their children is one of constitutional dimensions." *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976).

In numerous cases since, the Texas Supreme Court has upheld the fundamental right of parents. *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003) (Discussing "the parent's fundamental liberty interest in maintaining custody and control of his or her child."); *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (Quoting Troxel, "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family."); *Derzapf*, 219 S.W.3d at 333 ("A court may not lightly interfere with child-rearing decisions made by … a fit parent … simply because a 'better decision' may have been made."); *Chambless*, 257 S.W.3d at 700 ("The State '[cannot] infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made.'"); *Scheller*, 325 S.W.3d at 644 ("Parental control and autonomy is a 'fundamental liberty interest.'"); *In Interest of H.S.*, 550 S.W.3d 151, 161 (Tex. 2018) (Commenting on "the fundamental right of parents to make child rearing decisions.").

In light of the clear and extensive history from the U.S. Supreme Court and Texas Supreme Court on the subject, it is beyond question that the Fourteenth Amendment to the U.S. Constitution protects the fundamental right of parents to raise and make decisions for their children without government interference, subject only to laws that pass the strict scrutiny test.

V. The Scope of a Parent's Fundamental Right Under the Fourteenth Amendment is Expansive

Although the full scope of parental rights protected by the Due Process Clause is not defined, many cases have clearly outlined the extensive nature of this right.

A. Parents Have the Fundamental Right to Direct the Care, Control, Custody, and Nurture of Their Children

Under *Prince,* it is cardinal that "the custody, care, and nurture of the child reside first in the parents." *Prince*, 321 U.S. at 166. See also *Quilloin*, 434 U.S. at 255 (Citing *Prince*: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") The fundamental right of parents in the companionship, care, custody, and management of his or her children "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. at 651.

Other cases from the U.S. Supreme Court repeat this principle, defining the scope of parental rights repeatedly as including the right to care, control, custody, and nurturing of the child. *Lassiter*, 452 U.S. at 27; *Kramer*, 455 U.S. at 753; *Troxel*, 530 U.S. at 66.

Texas Supreme Court cases have further solidified the scope of this right. See, e.g., *Derzapf*, 219 S.W.3d at 334 (citing Troxel "As the Troxel plurality stated, '[I]t is cardinal. . . that the custody, care and nurture of the child reside first in the parents.'"); *Chambless*, 257 S.W.3d at 700 ("Parents enjoy a fundamental right to make decisions concerning 'the care, custody, and control of their children.'").

The office of the Texas Attorney General has also recognized the constitutional scope of parental issue in its review of *Troxel*, acknowledging that, "The message of Troxel may thus be summarized: state statutes that infringe upon a parent's right to control the care and custody of his or her children are subject to strict scrutiny." *Tex. Op.* GA-0260, WL 2326558.

This right is one that is enduring and not easily subjected to interference by the state. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. at 753.

In *Troxel*, the U.S. Supreme Court declared that the right of parents to direct the "care, custody, and control of their children" is the "oldest of the fundamental liberty interests." *Troxel,* 530 U.S. at 65. The *Troxel* court then overturned a New York statute which allowed third parties to petition for access to a parent's child. Key to the *Troxel* court's holding were findings that the statute afforded no deference to the parent's decision of a child's visitation times with third parties, that the parent was not found to be unfit in any way, and that the statue provided broad standing for any person to seek visitation with the child for any reason. The Court admonished that "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id*. at 72–73.

Taken as a whole, these cases stand for the proposition that a parent has a constitutionally protected interest in directing the care, control, custody, and nurture of his or her children.

B. Parents Have the Fundamental Right to Direct the Education, Upbringing, Moral and Religious Training, and Healthcare of their Children

The U.S. Supreme Court has likewise recognized that the right of parents to raise their children includes the right of the parent to direct the education, upbringing, moral and religious training, and healthcare of the child.

In the landmark case of *Meyer v. Nebraska*, the Court ruled that it was impermissible under the Fourteenth Amendment for the state to prohibit the teaching of a foreign language in private schools, which the Court found to be in violation of both the rights of the teacher and the "natural duty of the parent to give his children education suitable to their station in life." *Meyer*, 262 U.S. at 400. The Court explained its ruling by noting that "the Legislature has attempted materially to interfere with. . . the power of parents to control the education of their own." *Id*. at 401.

Just two years later, in *Pierce*, the Court reviewed an Oregon statute which required "every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him to a public school for the period of time a public school shall be held during the current year." *Pierce*, 268 U.S. at 530 (quotations omitted). The Court held that:

> Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. *Id*. at 534–35 (citation omitted).

The high Court further solidified this principle in subsequent cases, consistently returning to its rulings in *Meyer* and *Pierce* when defending the principle that parents have a constitutional right to direct their child's education. *Prince*, 321 U.S. at 166; *Yoder*, 406 U.S. at 214; *Glucksberg*, 521 U.S. at 720; *Troxel*, 530 U.S. at 65.

In *Prince*, the Court found that this right is not unlimited when weighed against the right of the state to enforce child labor laws. Nevertheless, the Court then held in *Wisconsin v. Yoder* that the state's interest was not strong enough when the state sought to force defendant's children to attend school until age sixteen, contrary to the families' wishes and their deeply held religious beliefs. The Court noted that the interest at play was particularly significant because it included both an interest under the Free Exercise Clause and also an interest of the parents in the religious upbringing of their children:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare (them) for additional obligations." *Wisconsin v. Yoder,* 406. U.S. at 214.

The Court further explained that "The duty to prepare the child for 'additional obligations,' referred to by the Court [in *Pierce*], must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id*. at 233. It then summarized the holding in *Pierce* by saying, "However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children." *Id*.

In *Parham*, the Court found that the right of parents also includes the authority to make healthcare decisions for their children. This constitutional right "includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice. . . [H]istorically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602. The Court went on:

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments. *Id*. at 603.

It is clear from this long history of cases that the liberty of parents to raise their children free from state interference includes the liberty to direct their education, upbringing, their moral and religious training, and their healthcare. The state may not impermissibly burden the rights of the parent by mandating that the child attend public school or by placing undue requirements on the parent's ability to educate and train the child through alternative means, provided the parent has fulfilled the duty to "prepare [the child] for additional obligations." *Pierce*, 268 U.S. at 535.

VI. The State May Not Interfere with the Fundamental Right of Parents Without Meeting the Most Stringent Constitutional Requirements

When considering the scope of permissible interference by the state into parenting decisions and the parent-child relationship, three key constitutional parameters clearly emerge from U.S. Supreme Court and Texas Supreme Court cases.

A. State Interference with the Fundamental Right of Parents is Subject to Strict Scrutiny

When fundamental rights are at issue, the proper standard of review is strict scrutiny. *See Troxel,* 530 U.S. at 80 (Thomas, J., concurring) (noting that strict scrutiny is the appropriate standard for reviewing the infringement of fundamental rights such as parental right to direct child's upbringing). See also *Tex. Op.* GA-0260, WL 2326558 at 4 (explaining that Troxel requires that state statutes which infringe on a parent's fundamental right to control the care and custody of his or her children be subject to strict scrutiny.)

Application of this standard prevents any infringement of fundamental rights at all "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 301–02. See also *Glucksberg*, 521 U.S. at 721 (noting that the Fourteenth Amendment forbids the government from infringing on fundamental liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.).

Therefore, any action taken by the state which infringes on the right of parents to raise their children and to direct the child's care, control, custody, nurture, education, upbringing, moral and religious training, or healthcare must be found unconstitutional unless it is narrowly tailored to serve a compelling state interest.

B. The State and its Judges Must Presume that a Parent is Fit and that a Fit Parent Acts in Best Interest of His or Her Children

As a plethora of cases make clear, when evaluating a parent's child-rearing decisions, the courts must presume that a parent is fit and that a fit parent acts in the best interest of his or her child. *Stanley*, 405 U.S. at 651; see also *Parham*, 442 U.S. at 602; *Troxel*, 530 U.S. at 68. Texas Supreme Court cases have likewise recognized this presumption. *Wiley*, 543 S.W.2d at 352; *Mays-Hooper*, 189 S.W.3d at 778; *Derzapf*, 219 S.W.3d at 333; *Chambless*, 257 S.W.3d at 700; *Scheller*, 325 S.W.3d at 642. In a review of *Troxel's* effect on certain Texas visitation statutes, the office of the Texas Attorney General has also recognized this presumption. *Tex. Op*. GA-0260, WL 2326558. "A court may not, in visitation cases, substitute its own judgment in such a way as to infringe upon this fundamental liberty." Id. at 4.

A judge is not allowed to merely substitute his or her opinion for that of the parent when considering the best interest of the child. "Best interest" is not a buffet where the state or a judge is allowed to select those items which "seem best" over the parent's

objections. "As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S., 72–73.

This constitutional presumption gives practical guidance to state judges in considering the difficult and subjective concept of what is in a child's "best interest." The judge is required to presume that a decision made by fit a parent *is* the best interest of the child. "So long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's child." *Id.* at 68.

A showing that the parent is unfit will rebut this presumption. Similarly, decisions of a fit parent may be restricted in a limited fashion with evidence sufficient to rebut the presumption that a particular decision is in a child's best interests.

In the wake of *Troxel*, then Attorney General Abbott considered when the decision of a fit parent may be overruled and concluded that, in the context of grandparent visitation, in order to satisfy the requirements of *Troxel* it must be proven "by a preponderance of the evidence, either that the parent is not fit, or that denial of access by the grandparent would significantly impair the child's physical health or emotional well-being." Tex. Op. GA-0260 WL 2326558 at 9. The Abbott opinion concluded that this standard reflected a "reasoned and thoughtful" approach and "has the virtue both of adopting the test of the most recent Texas appellate case on the matter in question, and of most closely complying with the caveats imposed by Troxel." *Id*. at 10.

Immediately following the 2004 AG opinion, various Texas statutes implicating parental rights in different ways were amended to reflect this principle. Tex. Fam. Code Ann. § 102.004 (2017); Tex. Fam. Code Ann. § 153.432 (2017); Tex. Fam. Code Ann. § 153.433 (2017); Tex. Fam. Code Ann. § 156.006 (2017). Statues added since *Troxel* have continued this trend. Tex. Fam. Code Ann. § 153.6031 (2017). Other statues had already adopted similar language prior to *Troxel*. Tex. Fam. Code Ann. § 153.131 (2017); Tex. Fam. Code Ann. § 156.102 (2017); Tex. Fam. Code Ann. § 263.404 (2017).

The significant impairment standard has become a staple in Texas family law as the standard required to overcome the parental presumption. This standard has the virtue of "most closely complying with the caveats imposed by Troxel." Tex. Op. GA-0260, WL 2326558 at 10.

Therefore, the constitutional requirements surrounding the best interest of the child and the parental presumption can be summarized as follows: The state and state

judges are required to presume that a parent is fit and that a fit parent acts in the best interest of his or her child. A judge may not substitute his or her opinion of what is in the child's best interests without first overcoming this presumption. To overcome this presumption, it must be proven either that the parent is unfit or that the parental decision being reviewed will significantly impair the child's physical health or emotional well being.

C. Clear and Convincing Evidence Is Required for Termination of Parental Rights

The U.S. Supreme Court has found that the fundamental liberty implicated by parental rights termination proceedings requires a heightened standard of evidence to infringe.

In *Santosky v. Kramer*, the Court reviewed a New York statute which allowed for termination of parental rights using the standard of a preponderance of the evidence. It struck down the statute, stating, "Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky v. Kramer*, 455 U.S. at 747–48.

The Court concluded by noting that a majority of states had adopted a "clear and convincing" standard for termination proceedings and held that "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id*. at 769. Therefore, in a proceeding to terminate parental rights, the Fourteenth Amendment to the U.S. Constitution mandates that a minimum standard of clear and convincing evidence be used.

VII. Conclusion

The question addressed by this brief is: What standards have the U.S. and Texas Supreme Courts applied when balancing the rights of the state against the fundamental right of parents to raise their children free from government intrusion?

As detailed above, the right of parents to raise their children is a fundamental right protected under the Due Process Clause of the Fourteenth Amendment and any burden on the exercise of that right is subject to strict scrutiny. Nearly 100 years of case precedent from the U.S. Supreme Court and the Texas Supreme Court place this fact beyond dispute. This fundamental right includes the ability to direct the care, control, custody, nurture, upbringing, education, moral and religious training, and healthcare of the child.

In order for the state to permissibly burden the right of parents to raise their children, the state's actions must be narrowly tailored to accomplish a compelling state interest. The state and its judges are constitutionally required to presume a parent to be fit and that a fit parent is acting in the best interests of his or her child. A judge may not substitute his or her opinion of what is in the child's best interests without first overcoming this presumption. To overcome the presumption, a judge must find either that the parent is unfit or that a particular decision by the parent must be overruled in order to prevent a significant impairment of the child's physical health or emotional well being. Before the state may terminate the rights of a parent in his or her child, the state must prove the required findings by at least clear and convincing evidence.